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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 583

JOSEPH H. LYONS and JESSIE H. LYONS, individually and as co-partners doing business under the name and style of LYONS ELECTRIC DISTRIBUTING COMPANY,

Petitioners,

v.

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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February 26, 1953

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OPINIONS BELOW

The opinion of the District Court (R. 51-52) is not officially reported. The opinion of the Court of Appeals (R. 55) has not yet been officially reported.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254(1).

QUESTION PRESENTED

Does a federal district court in which a federal antitrust action is pending have the power to stay the prosecution of a prior action brought in a state court by defendant (respondent here) against plaintiffs (petitioners here) and in which the latter have pleaded the federal antitrust laws as a defense?

STATUTES INVOLVED

Judicial Code, 28 U. S. C. § 2283. *Stay of State court proceedings*

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

STATEMENT

The Facts

Respondent employed petitioners as agents, for a period of seven and one-half years, in connection with the sale and distribution of electric light bulbs and fluorescent tubes (R. 29). After a partial audit of petitioners' accounts in 1951, it was found that the reports which had theretofore been made by petitioners to respondent were fraudulent (R. 41-42).

An action for an accounting was brought by this respondent against these petitioners in the New York State

Supreme Court on February 8, 1952 (R. 40). By an amendment to their answer in that court, petitioners asserted a defense of illegality under the antitrust laws (R. 33-34). Thereafter, petitioners brought the present action for treble damages against respondent and General Electric Company.

The state court accounting action having been placed on the calendar for trial, petitioners moved in the federal court to prevent a state court trial on respondent's right to an accounting (R. 22). The affidavit in support of the motion complained that petitioners' assertion of the same facts in both the state and federal courts would necessitate certain duplications of trial and pre-trial procedures (R. 27). Although this burden was voluntarily assumed by petitioners, they none the less contend that they should be given relief by way of a stay of the prior state court proceedings.

Since the entry of the order of which a review is here sought, the state court action has been set down for trial on March 10, 1953.

Argument

POINT I

THE JUDICIAL CODE FORBIDS AN INJUNCTION UNDER THE CIRCUMSTANCES OF THE PRESENT CASE.

Since the beginning of our federal form of government, there has been a basic principle of comity that federal courts will not interfere with or enjoin state court proceedings except in certain specific situations. This principle was

first enacted into law in 1793 and is presently found as Section 2283 of the Judicial Code:

> "§ *2283. Stay of State court proceedings*
>
> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments" (28 U. S. C. § 2283).

Section 2283 acknowledges only three exceptional circumstances in which a court of the United States may enjoin a state court proceeding, namely, (a) where "expressly authorized by Act of Congress", (b) "where necessary in aid of its jurisdiction", or (c) "to protect or effectuate its judgments". No one of these three circumstances is found in the present case.

1. There is no applicable Act of Congress authorizing a grant of the injunction sought here. All federal statutes coming within this exception were listed by this Court in *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118 (1941). The Emergency Price Control Act of 1942 was added to this list in *Bowles* v. *Willingham*, 321 U. S. 503, 510 (1944). None of those statutory exceptions has any application to the present situation.

2. Neither is there any outstanding judgment of this Court to be protected under the final clause of the statute. In the reviser's note to § 2283, it was stated that the phrase "to protect or effectuate its judgments", added to the former § 265, was to apply to "relitigation of cases and contro-

versies fully adjudicated by such [Federal] courts", the situation involved in the *Toucey* case, *supra.*

3. The only phrase of the statute which could give rise to any possible question of intepretation is the exception "where necessary in aid of its jurisdiction". This exception has been held to include only two types of civil cases:

(a) Jurisdiction over removed actions, and

(b) Jurisdiction over *in rem* actions where the *res* is in the *prior* possession of the federal court and is essential to the jurisdiction. *Toucey* v. *New York Life Ins. Co.,* 314 U. S. 118 (1941).

This is not a removed action. Furthermore, both the instant action and the accounting action in the New York State Supreme Court which petitioners here seek to enjoin are *in personam* actions. In each case, the respective courts have complete personal jurisdiction over the parties. This court, in explaining the rationale behind this point of jurisdiction in *Mandeville* v. *Canterbury,* 318 U. S. 47 (1943) said (pp. 48-49):

> "Section 265 of the Judicial Code, 28 U. S. C. § 379, provides that except as authorized by any law relating to proceedings in bankruptcy 'the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State'. To this sweeping command there is a long recognized exception that if two suits pending, one in a state and the other in a federal court, are *in rem* or quasi *in rem,* so that the court or its officer must have possession or control of the property which is the subject matter of the suits in order to proceed with the cause and to grant the relief sought, the court first acquiring jurisdiction or assuming

control of such property is entitled to maintain and exercise its jurisdiction to the exclusion of the other.

"In such cases this Court has uniformly held that a federal court may protect its jurisdiction thus acquired by restraining the parties from prosecuting a like suit in a state court notwithstanding the prohibition of § 265. This exception to the prohibition has been regarded as one of necessity to prevent unseemly conflicts between the federal and state courts and to prevent the impasse which would arise if the federal court were unable to maintain its possession and control of the property, which are indispensable to the exercise of the jurisdiction it has assumed. But where the judgment sought is strictly *in personam* for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one court, which may be set up as res judicata in the other. These principles were recognized and the authorities sustaining them collected in *Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189, and *Toucey* v. *New York Life Ins. Co.,* 314 U. S. 118, 134-36."

Similarly, in *Kline* v. *Burke Construction Co.,* 260 U. S. 226 (1922), this Court, speaking of Federal and State court actions said (p. 235):

". . . The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions *in rem* and does not exist in

> actions *in personam*, involving a question of personal liability only, the rule applies in the former but does not apply in the latter."

The lower federal courts have consistently applied these principles to their constructions of Section 2283. Only two years ago, when faced with the precise situation here involved, Judge Coxe held in *Bascom Launder Corp.* v. *Telecoin Corp.*, 9 F. R. D. 677, 678 (S. D. N. Y. 1950) that:

> "Plaintiffs, however, are not entitled to an order staying defendant from prosecuting actions against them pending in the State courts. These actions are stated to be for the recovery of rental fees and for goods sold and delivered under contracts between defendant and them. Plaintiffs claim that these contracts violate the Anti-Trust laws and are void. But this court cannot stay proceedings in a State court, except as expressly authorized by an Act of Congress, or where necessary in aid of its own jurisdiction, or to protect or effectuate its own judgments. Section 2283, Rev. Title 28, U. S. C. A. The fact that, if plaintiffs are successful here, they may recover, as part of their damages, the amounts which they may be required to pay to defendant under any such State court judgments, does not justify this court in staying the prosecution of such State actions."

In *Red Rock Cola Co.* v. *Red Rock Bottlers, Inc.*, 195 F. 2d 406 (5th Cir. February 18, 1952), the Fifth Circuit Court of Appeals fully reviewed the applicable authorities in holding that an injunction could not properly issue under circumstances substantially identical with those of the present case. In that case, as here, the defendant in the federal action had previously instituted a contract action in the

state court to which a defense of illegality under the anti-trust laws was pleaded. The defendant in the state court action having asserted that defense then instituted a treble damage action in the federal court and, precisely as in the present case, called upon the United States Court to enjoin the state court action. The District Court granted the injunction. The Fifth Circuit unanimously reversed, saying (p. 410):

> "The suit for treble damages in the federal Court, and the suit in the State Court to have declared Cola's right to terminate the contract because of the failure of Bottlers to comply with the minimum purchase requirements are both proceedings *in personam.* As such, each Court is entitled to proceed without interference from the other. *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226. If the contract, or the secret formula or other rights under the contract, could in any view be considered as the *res,* the State Court first acquired jurisdiction. *Palmer* v. *Texas,* 212 U. S. 118, 29 S. Ct. 230, 53 L. Ed. 435. The further contention of the plaintiff that the question of breach of contract under the circumstances of this case is exclusively within the jurisdiction of the federal Court in its determination of the antitrust suit cannot be sustained. If, because contrary to the Anti-Trust Act, the acts inducing the breach are available as a defense in the State Court action (as in fact they have been asserted by the defendant in that proceeding), any erroneous action is subject to review by the United States Supreme Court. Cf. *Bruce's Juices* v. *American Can Co.,* 330 U. S. 743, 67 S. Ct. 1015, 91 L. Ed. 1219. If not so available as a defense, and therefore not a question which could be raised in the State Court, the result there would

not be *res adjudicata* in the suit in the federal Court. So in neither view could the judgment in the State Court prejudice the ultimate result of the federal Court proceeding."

Petitioners place principal reliance on four cases brought by former Administrators under the Emergency Price Control Act of 1942, and in their brief (Pet. 11, 13), set out extensive excerpts from the two leading cases in the group, *i.e., Bowles* v. *Willingham,* 321 U. S. 503 (1944), and *Porter* v. *Lee,* 328 U. S. 246 (1946). In each case, the portions omitted by appellants from their quotations contain a holding by this Court that the jurisdiction of the federal court under the Emergency Price Control Act of 1942 in the situation as given was exclusive.

Moreover, in the *Willingham* decision, this Court approved its previous analysis in *Toucey* v. *New York Life Ins. Co., supra,* adding the Emergency Price Control Act of 1942 as an additional statutory authority falling directly within the first exception under the provision which is now § 2283 of the Judicial Code.

Other than the rent cases and one exception hereinafter referred to, petitioners cite no authority involving an injunction similar to the one demanded in the court below. Authorities are cited for injunctions by one federal court against another federal court, *Steelman* v. *All Continental Co.,* 301 U. S. 278 (1937); for injunctions against individuals where no state court action was pending, *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175 (1920); for injunctions staying commercial arbitration, *Ring* v. *Spina,* 148 F. 2d 647 (2d Cir. 1945); and *Hammett* v. *Warner Bros.,* 176 F. 2d 145 (2d Cir. 1949) is cited, although no injunction of any type was involved in that case.

The one holding cited by petitioners which does bear upon the question raised before this Court is *Katz Drug Co.* v. *Sheaffer Pen Co.*, 6 F. Supp. 212 (D. C. Mo. 1933), where a Federal District Court in Missouri enjoined a prior Iowa state court action on the ground that the bringing of the Iowa action was in itself designed to further the anti-trust conspiracy charged. Even apart from this distinction, the courts below properly declined to follow the *Katz* case for the reason that it rests upon an improper reading of two earlier opinions of this Court.

The Missouri court there relied upon *Julian* v. *Central Trust Company*, 193 U. S. 93 (1904), and *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175 (1920). In both the *Julian* and *Wells Fargo* cases this Court was dealing with the validity of an injunction against an individual in the absence of any state court proceedings. In the *Julian* case, the federal court had sold property under a decree in a bankruptcy proceeding and had retained jurisdiction to determine all liens and claims against the estate. The court was held to have properly enjoined an individual who threatened to enforce a state court judgment against such property in another court.

Thus, even had there been a state court proceeding pending at the time, the *Julian* decision would have been valid as being in aid of the federal court's *in rem* jurisdiction.

The *Wells Fargo* case again was concerned with an injunction granted against an individual in the absence of any pending state proceedings. The injunction was against the enforcement of a judgment in a prior state court action, which was procured in fraud of a contract asserted in the federal court, and this Court distinguished § 265 of the Judicial Code, stating:

"... 'While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. It would simply take from him the benefit of judgments obtained by fraud.'

"...

"Without pursuing the subject further, we hold that the present suit is not one to stay proceedings in a state court in the sense of § 265" [pp. 185-86].

It is submitted that neither the *Julian* decision nor the *Wells Fargo* decision lend any support to the contention that a federal court may enjoin state court proceedings other than as provided by Section 2283 of the Judicial Code.

POINT II

PETITIONER HAS NOT SHOWN ANY REASON WHY THE PETITION SHOULD BE GRANTED.

In stating the reasons why, in their opinion, a writ of certiorari should be granted, petitioners have urged only two points, which are:

(1) that the decision of the court below involves an important question of federal law which should now be settled by this Court (Pet. 7); and

(2) that the decision of the court below is in conflict with decisions of this Court (Pet. 8).

A. The Decision of the Court Below Involves a Non-Final Order and Review Is Not Warranted.

Petitioners here seek review of an interlocutory order. Although this Court concededly has power under Title 28 U. S. C., Section 1254(1), to issue its writ of certiorari to review non-final orders, the cases emphasize that the power of interlocutory review is to be exercised only in "extraordinary cases". Moreover, the fact that an order is not final may constitute, of itself, sufficient ground for denial of the application. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.,* 240 U. S. 251, 258 (1916).

Those "extraordinary cases" in which this Court has issued the writ to review non-final determinations have either posed jurisdictional issues "fundamental to the further conduct of the cases", *Land* v. *Dollar,* 330 U. S. 731, 734 (1947), important issues of constitutional law, *United States* v. *General Motors Corp.,* 323 U. S. 373 (1945), or issues of such great importance as to warrant the grant despite the interlocutory stage of the case, *Johnson* v. *Eisentrager,* 339 U. S. 763 (1950).

The issue posed by the order here sought to be reviewed is neither jurisdictional (*Smith* v. *Apple,* 264 U. S. 274 (1924)) nor constitutional.

On petitioners' own admissions, it is clear that the application does not involve a question of great importance. It is, for example, conceded that the issue upon which review is sought has arisen only four times in the 39 years since enactment of the Clayton Act and that it has never created any disagreement in the decisions of Courts of Appeals (Pet. 7). These concessions in themselves belie the contention that the issue is one of importance.

B. The Decision of the Court Below Is Not in Conflict with Decisions of This Court.

Petitioners have urged that the decision of the court below conflicts with decisions of this Court in *Bowles* v. *Willingham,* 321 U. S. 503 (1944), *Porter* v. *Lee,* 328 U. S. 246 (1946), *Porter* v. *Dickson,* 328 U. S. 352 (1946), *Fleming* v. *Rhodes,* 331 U. S. 100 (1947), and *Steelman* v. *All Continental Corp.,* 301 U. S. 278 (1937). Our discussion under Point I above has demonstrated that disposition of this case is not controlled by the aforementioned decisions. Because those decisions are inapposite, it is manifest that the decision below cannot conflict with them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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PETITIONER'S REPLY MEMORANDUM

While not material, petitioners respectfully controvert the reference to fraud contained in respondent's statement of "the facts" (at p. 2 of its brief).

Respondent's complaint in the State Court action does not allege—it studiously, it seems, refrains from alleging—fraud or anything which may be viewed as amounting to fraud; it alleges only that certain payments "were less than the amounts that should have been paid pursuant to the terms of the contracts between the parties"—

without further enlightenment (R. 30). The answer denies that allegation (R. 33) and alleges, to the contrary, that Lyons had "kept plaintiff fully advised of their acts and transactions insofar as they related to plaintiff and the lamps received from plaintiff and plaintiff approved all of said acts and transactions," that Lyons had "rendered reports on the forms provided by the plaintiff and plaintiff accepted said reports" and "defendants made payments to the plaintiff in accordance with said reports and plaintiff accepted said payments" (R. 32-3).

The term "fraudulent" appears only in a statement "on information and belief" in an attorney's affidavit submitted in opposition to the motion for injunction—without specification of facts or evidence (R. 41-2). Such a statement of course is not probative, much less a basis for a definitive statement of fact.

Respectfully submitted,

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March 2, 1953.